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No. ~~895~~ 115

In the Supreme Court of the United States

OCTOBER TERM, 1929

W. P. BROWN & SONS LUMBER COMPANY, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition in this case.

STATUTES INVOLVED

The statutes involved are set forth in the appendix at the end of this memorandum.

I

Two of the questions which are presented by the petition for certiorari are now before this Court in the cases of *Charles H. Stange* v. *United States,* No. 554, October Term, 1929, writ of certiorari granted March 3, 1930, and *Annette Aiken, Administratrix of the Estate of Friend N. Aiken, deceased,* v. *Robert H. Lucas, Commissioner of In-*

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ternal Revenue, No. 777, October Term, 1929, writ of certiorari granted May 5, 1930.

One of these questions is whether a consent in writing, waiving the period of limitations for *assessment* of taxes due for 1917, also confers upon the Commissioner of Internal Revenue the right to *collect* the tax after the expiration of the statutory period for collection. If the waiver as to assessment does not also include a waiver as to collection, a second question arises, whether a consent in writing, waving the period of limitations for *collection* of taxes due for 1917, is valid and effective when executed after the period of limitations for collection had already expired.

On December 13, 1920, the petitioner filed an unlimited waiver of all statutory limitations as to *assessment.* (R. 29.) This waiver was terminated on April 1, 1924, by a ruling of the Treasury Department. II–1 Cumulative Bulletin, p. 174. The statutory period within which assessment and collection could be made in this case would have expired on April 1, 1923, five years after the return was filed. On December 10, 1923, the petitioner filed a waiver extending the period for *assessment and collection* to December 10, 1924. (R. 31.) On October 25, 1924, the petitioner filed another waiver extending the period for *assessment and collection* to December 10, 1925. (R. 33.) The question presented is the effectiveness of these

waivers to extend the period for *collection* beyond April 1, 1923.

II

The other questions raised in the petition for certiorari, we submit, do not warrant review by this Court.

One of these questions relates not to the efficacy of the waivers to extend the period for *collection* beyond April 1, 1923, but to the question whether, assuming that the period was so extended, it has, nevertheless, now expired. On March 6, 1923, the Commissioner made a jeopardy deficiency assessment and later that month the petitioner filed a claim for the abatement of this assessment. (R. 4, 12.) On October 28, 1925, the Commissioner notified the petitioner of the partial allowance of the claim in abatement (R. 4, 12), and on November 18, 1925, the petitioner filed an appeal from this determination with the Board of Tax Appeals (R. 3).

The Circuit Court of Appeals held that the Commissioner's final determination of the 1917 deficiency was made on October 28, 1925, as evidenced by the Commissioner's notice of that date, within the period of limitations as to assessment and collection contained in the final waiver, from which determination the taxpayer appealed to the Board of Tax Appeals; and that by reason of the provisions of Section 280 and related sections of the

Revenue Act of 1924 (*infra*) and of Sections 283 (f) and 283 (*l*) of the Revenue Act of 1926 (*infra*), the period of limitation for assessment and collection of the deficiency was suspended until after the decision of the Board should become final. It is submitted that this decision is not in conflict with the decision of this Court in *Russell* v. *United States*, 278 U. S. 181, where it was held that the six-year period for collection provided by Section 278(d) of the Revenue Act of 1924 was not intended to apply to the collection of the tax upon an assessment made prior to June 2, 1924, the effective date of the Revenue Act of 1924. In the instant case a jeopardy assessment was made on March 6, 1923; but this was not a final determination, since the taxpayer filed a claim in abatement. Pending the Commissioner's final action on the claim, additional waivers of assessment and collection were filed. The Commissioner's final determination of the correct amount of the deficiency was not made until October 28, 1925, when he mailed a notice to the taxpayer allowing the claim in abatement in part. It was from this determination that the taxpayer appealed to the Board of Tax Appeals. The instant case thus differs from the *Russell case* in that here the taxpayer was permitted to take advantage of the new right of appeal to the Board for a determination of its tax liability. The period of limitation for assessment and collection was sus-

pended by this appeal. Sections 277(b), 278(d), and 280 of the Revenue Act of 1924 (*infra.*).

The petitioner also contends that Section 283(f) of the Revenue Act of 1926 (*infra*), and related sections of that Act, may not be given a retroactive effect. But that section is by its express terms retroactive. The language used is susceptible of no other construction. The facts in the instant case clearly come within the express provisions of that section.

The petitioner denies that the waiver of October 25, 1924, is still in full force and effect since by its terms it expired on December 10, 1925. This contention was disposed of by this Court in *Florsheim Bros. Dry Goods Co.* v. *United States,* 280 U. S. 453. It was there held that the Revenue Acts of 1924 and 1926, which were enacted while similar waivers were still in force and while the taxpayer's liability was thus still alive, extended the period for collection to six years after assessment.

CONCLUSION

Although the United States does not oppose the petition in this case, we submit that the decision of the court below on the points discussed in subdivision II of this Memorandum was correct and that there is no conflict on these questions. We, therefore, suggest that this Court limit its review to the question whether the waivers filed by the tax-

payer were effective to extend the period for collection of the tax beyond April 1, 1923.

Respectfully submitted.

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MAY, 1930.

APPENDIX

The Revenue Act of 1924, c. 234, 43 Stat. 253, provides in part:

> SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed * * * the taxpayer * * * shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals. * * *
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. * * * proceeding [for collection] shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.
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> SEC. 277. (a) Except as provided in section 278 and in subsection (b) of section 274 and in subsection (b) of section 279.
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> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be

assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. * * *

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

SEC. 280. If after the enactment of this Act the Commissioner determines that an assessment should be made in respect of any * * * tax imposed by * * * the Revenue Act of 1917 * * * the amount which should be assessed (whether

as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part:

SEC. 274. (a) If in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision [a] of section 247) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint of a proceeding in court, and for 60 days thereafter.

SEC. 278. * * *

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of

limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

SEC. 283. * * *

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed * * * by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a

notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts,

shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision [b] of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

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